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No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,
AND
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for Petitioner
Northwest Airlines, Inc.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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Petitioner Northwest Airlines, Inc., submits this supplemental brief to respond to the brief submitted by the Solicitor General as *amicus curiae.* The Solicitor General's brief demonstrates why certiorari should be granted in this case.

INTRODUCTION

In the three and one-half months since the Court invited the submission of an *amicus* brief, the government has been unable to determine a firm position on the legal issues raised by the petition. Indeed, the Solicitor General repeatedly emphasizes the difficulty of the issues. Thus, even the government is in need of authoritative resolution of these important issues that directly affect the government's administration of the Equal Pay Act and the Civil Rights Act of 1964. As explained in Northwest's petition and in the *amicus* brief for the Chamber of Commerce of the United States, employers, unions and employees throughout the country should not be left indefinitely in a legal limbo, such as the one in which even the government finds itself.

The Solicitor General's suggestion that the Court grant certiorari in an antitrust case raising a contribution issue, *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972, while holding this petition in abeyance, is hardly a useful approach. The legal and policy questions raised by the issue of contribution under the federal employment discrimination statutes are distinctly different from those raised by the contribution issue under the antitrust laws. There is no reason to believe that the Court's consideration of *Westvaco* alone would help determine whether contribution should be permitted in favor of employers against unions under the Equal Pay Act or Title VII. The issues in this case warrant independent treatment.

In urging the grant of certiorari in *Westvaco,* the Solicitor General notes:

> "[t]he question presented is substantial. The threshold issue is whether, and the extent to which, the federal courts in exercising their federal common-law powers

have the authority to create a private right of action for contribution under the antitrust laws." *Westvaco Corp.* v. *Adams Extract Co., supra,* Br. for U.S. at 9.

Whether federal courts should assert this authority under the employment discrimination laws is neither less substantial nor less important.

Perhaps the most effective course would be to grant certiorari in both cases and to set the cases for argument in tandem. That approach would provide the Court with an opportunity to take a comprehensive look at the question of implying a right of contribution under diverse federal statutes. The new Restatement of Torts now provides, as a comprehensive principle of tort law, that there is a general right of contribution among joint tortfeasors even where a judgment has not been rendered against all of them. *See Restatement (Second) of Torts* §886A (1979). Tandem consideration of both cases would enable the Court to decide how far to apply this doctrine in the enforcement of federal statutory claims.*

A. Contribution Under the Equal Pay Act

The Solicitor General recognizes that the legislative history of the Equal Pay Act provides powerful support for Northwest's argument that, contrary to the holding below, Congress intended to treat unions and employers equally under the Act and to make unions bear independent financial liability for violating the Act's prohibitions against inducing discriminatory wage levels. Without taking a definite po-

See generally Note, *Contribution in Private Antitrust Actions,* 93 Harv. L. Rev. 1540 (1980), concluding that contribution should be permitted in antitrust cases.

sition on this issue, however, the Solicitor General suggests that union financial liability may nevertheless be unwarranted. The Solicitor General reasons that recovery under the Act constitutes, in essence, a return of unpaid wages and that, therefore, even though a union may violate the Act, only an employer should be responsible for paying the illegally withheld wages. There are three fundamental flaws with this suggestion that repeated statements of Congressional intent should be frustrated.

1.

The Solicitor General's analysis would prove too much and would require the government to disavow the position that it has already convinced lower courts to accept. The apparent inference flowing from the government's argument would be that only employers — but never unions — are responsible for restoring wages that have been withheld as a result of discriminatory wage scales. The government itself, however, has previously asserted that it, at least, may sue unions under the Equal Pay Act and force them in appropriate circumstances to pay back wages that they caused an employer to deny on grounds of sex.

The financial liability of unions in that type of suit was expressly upheld, for example, by the Fourth Circuit in *Hodgson* v. *Baltimore Regional Joint Board,* 462 F.2d 180 (1972), *affirming* 326 F. Supp. 371 (D. Md. 1971). Indeed, the court below in this case explicitly and repeatedly agreed that the government may enforce financial liability against unions in suits that it brings against them under the Equal Pay Act. *See* Pet. App. 7d, 9d, 11d.

Presumably, therefore, "recovery of unpaid wages" is not

inherently inconsistent with union liability. The real issue before this Court is whether unions may be required to shoulder a fair share of back pay liability arising out of suits brought directly by the affected employees, as Congress intended, as Northwest urges and as the Fifth Circuit agreed in *Sinyard* v. *Foote and Davies Division of McCall Corp.*, 577 F.2d 943, 945 (1978). The government's analysis does not advance that inquiry.

2.

The Court should be skeptical of the government's effort to characterize the financial relief available under the Equal Pay Act as restitutionary rather than compensatory. In any event, labels should not control the determination of the parties who may be liable for the relief. Congress has made unions expressly liable for "back pay" when they cause employers to pay sexually discriminatory wages and when the claim is pressed under Title VII. *See* 42 U.S.C. § §2000e-2(c)(3), 2000e-5(g). There is no reason to assume that Congress intended to exempt unions from financial liability for the sex discrimination that they cause when the claim is brought under the Equal Pay Act. Indeed, the legislative history of the Act indicates precisely the opposite.

The focus of the Equal Pay Act is the same as that of Title VII, even though the Act applies in a narrower class of employment discrimination cases — only those based on sex and taking the form of disparate wages. While the Solicitor General suggests that the Equal Pay Act is specially concerned with the unfair economic advantage that employers may achieve by paying women lower wages, any effort to draw this distinction between the statutes is illusory.

Like Title VII, the Equal Pay Act is designed to afford relief from employment discrimination. As this Court explained unambiguously in *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974):

> "Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry. . . ."

In adopting the Act, Congress pointedly recognized that unions may cause wage discrimination; such union conduct is separately pronounced illegal. *See* 28 U.S.C. §206(d)(2). Since the Congressional focus was on protecting women workers from discrimination by employers *or by unions* or by both, there is no basis in the structure, purpose, or terms of the Act to infer that Congress was assigning exclusively to employers the liability for illegally denied compensation.

3.

The Solicitor General also errs in suggesting that, despite expressions of Congressional intent, unions should perhaps be exempted from financial liability for violating §206(d)(2) because they do not benefit from wage discrimination. Underlying the Congressional decision to outlaw union efforts to cause wage discrimination, however, is the recognition that unions do have a direct financial incentive to induce or to ratify wage discrimination. A union may profit in at least two ways from securing a wage scale that discriminates against women.

First, when the union is dominated or controlled by men, as often happens, a discriminatory division of the total wage package will benefit the male control group, even though the

employer reaps no economic advantage at all. Second, when illegally low wages for women at a company provide the employer with a competitive advantage, the union may share in the illegal gain. Artificially lower wage costs are likely to result in increased demand for that employer's goods and services, thus protecting or increasing employment levels. Either result assures the union of *per capita* dues that it would not accure in the absence of the discriminatory wage levels.

As §206(d)(2) shows, Congress understood that unions do cause sex discrimination in wages and that they often do so because of a direct financial motive. Congress thus recognized the pragmatic predicate for union liability that the Solicitor General seems to ignore. The Solicitor General's speculative analysis, in short, does not justify adoption of a rule of law that automatically immunizes unions from a *pro rata* share of Equal Pay Act liability. As this Court recently observed in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578 (1979): "The ultimate question is one of Congressional intent, not one of whether this Court" — or the Solicitor General — "thinks that it can improve upon the statutory scheme that Congress enacted into law."

B. Contribution Under Title VII

The Solicitor General's brief is equally tentative about contribution under Title VII. The Solicitor General does not deny that most federal courts have agreed that an employer has a right of contribution that may be asserted to apportion liability under Title VII. *See* Pet. 21. His brief conspicuously does not embrace the EEOC's contention in the court below that the employer's right to contribution is forfeited unless he impleads the union at the outset of the employees' suit. As

the *amicus curiae* brief of the Chamber of Commerce of the United States explains (at 7-10), the EEOC's position below — which received some credence from the Court of Appeals' disposition — has created considerable confusion about the proper conduct of Title VII litigation.

On the merits, the court below termed the Title VII contribution issue a "complex and sensitive question" (Pet. App. 12d), even though most federal courts have recognized a right of contribution under Title VII, as had the district court in this case. The District of Columbia Circuit thus has expressed reservations that other circuits do not share. The Solicitor General nevertheless suggests deferral of the Title VII issue that is framed by this case. Deferral, however, is unwarranted.

As the Solicitor General points out in his brief in the *Westvaco* case (at 16), postponement of review of the antitrust contribution issue in that case would result in a "considerable expenditure of judicial resources and forum shopping without a commensurate increase in elucidation of the issues." Thus, he continued, "staying review for a more propitious case would be a costly procedure for both the judiciary and litigants." The situation is precisely the same here. The assertion of the EEOC's novel timeliness argument in the court below and the court's own reservations about the merits have injected doubt about the existence and enforcement of contribution under Title VII. A great deal of confusion and uncertainty — with the concomitant increase in the expenditure of judicial and litigant resources, as well as forum shopping — will undoubtedly ensue.

In sum, whatever position the government may finally elect to take on the merits, the Court now has the opportunity to settle an important issue of vast practical importance to employers, employees, unions, and trial

courts throughout the country. Moreover, as the government stated in *Westvaco* (at 16 n.17) — and it is equally true here — "[a]n authoritative resolution of the issues by this Court would thus save judicial resources, foster the uniformity desired on a question of federal law, and avoid forum shopping."

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should consider setting the case for argument in tandem with the *Westvaco* case, No. 79-972, if certiorari is granted in that case.

Respectfully submitted,

PHILIP A. LACOVARA
JAY KELLY WRIGHT
WILLIAM R. STEIN
Hughes Hubbard & Reed
Attorneys for Petitioner
Northwest Airlines, Inc.

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